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In the Supreme Court of the United States

SALIM AHMED HAMDAN,

Petitioner,

v.

DONALD RUMSFELD, *ET AL.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF GENERAL DAVID BRAHMS AND GENERAL JAMES CULLEN AS AMICI CURIAE IN SUPPORT OF PETITIONER [CONGRESSIONAL AUTHORIZATION LACKING]

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QUESTION PRESENTED

Amici will address the following question:

Whether Congress authorized the President to establish military commissions to conduct criminal trials of and impose punishment on petitioner and other similarly situated individuals.

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BRIEF OF GENERAL DAVID BRAHMS AND GENERAL JAMES CULLEN AS AMICI CURIAE IN SUPPORT OF PETITIONER

INTEREST OF THE AMICI CURIAE

Amici curiae are two retired military officers. They served, respectively, as the senior legal advisor for the United States Marine Corps and as the senior judicial officer of the United States Army. Each has extensive experience with U.S. military regulations and the Laws of War. Each dedicated his military career to the principle that the mission of the nation's Armed Forces must be consistent with the rule of law.

Amici believe that fundamental principle is violated by the court of appeals' holding that Congress has authorized the President to create a new system of criminal adjudication and punishment, avoiding the two existing mechanisms for meting out punishment for past acts—the civilian courts and the court martial process. Amici are concerned that trying petitioner before a military commission on charges brought under Military Commission Order No. 2 undermines the separation of powers and does so, moreover, in a way that threatens to upset the carefully circumscribed role of military justice.

Brigadier General David M. Brahms served in the Marine Corps from 1963 through 1988, including a tour of duty in Vietnam. During the 1970s, he served as the principal legal advisor for POW matters at Headquarters Marine Corps; in that capacity he was directly involved in issues relating to the return of American POWs from Vietnam. General Brahms was the senior legal advisor for the Marine Corps from 1985 through 1988, when he

retired from the military. General Brahms is currently in private practice in Carlsbad, California, and is a member of the Board of Directors of the Judge Advocates Association. He also served as the Technical Advisor for the film *A Few Good Men*.

Brigadier General James P. Cullen served in the United States Army for 27 years as an active and reserve officer in the Judge Advocate General's Corps, retiring as the Chief Judge (IMA) of the Army Court of Criminal Appeals. Before that, General Cullen served as the Staff Judge Advocate of the 77th Army Reserve Command and the commander of the 4th Judge Advocate General Military Law Center, which had responsibility for the 150 Army Reserve legal officers, court reporters, and legal clerks headquartered between Boston and Philadelphia.[1]

SUMMARY OF ARGUMENT

This case implicates the constitutional separation of powers. The President claims the authority to prosecute and punish Petitioner Salim Ahmed Hamdan outside both the civilian criminal justice system *and* the ordinary military criminal justice system. Moreover, the President claims the authority to prosecute Hamdan on a charge that derives neither from a congressional enactment nor from the traditional law of war.

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[1] Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing of this brief. The parties' letters of consent have been lodged with the Clerk. This brief was not written in whole or in part by counsel for a party, and no person or entity other than the amici curiae and their counsel has made a monetary contribution to the preparation and submission of this brief.

No statute supports this extraordinarily expansive assertion of Presidential power. The President purports to derive authority for his actions from the September 18, 2001 Authorization for Use of Military Force (AUMF), Pub. L. 107-40, 115 Stat. 224 (2001), and Sections 821 and 836 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 821, 836. Although Congress could, possibly, have authorized the President to establish military commissions and to prosecute certain people on specified charges before such commissions, neither the AUMF nor the UCMJ grant the President the broad authority he claims.

As its title suggests, the AUMF authorizes the use of force. It does not authorize the establishment of military commissions, and it does not delegate to the President the power to define criminal offenses unilaterally. The terms of the AUMF plainly authorize only the use of military force to prevent *future* terrorist attacks; they do not authorize the adjudication of *past* acts, whether terrorist or otherwise. In adopting the AUMF, Congress clearly articulated its intent to maintain the constitutional separation of powers. This Court, which has long recognized a distinction between prospective detention and retrospective punishment, should reject the President's expansive reading of the AUMF and instead construe that statute as it is written and as it was intended by Congress—a circumscribed authorization limited to the use of military force. See Part A, *infra*.

The President's reliance on the UCMJ is also misplaced. Section 836 authorizes the President to establish procedures for military commissions. It does not confer jurisdiction upon military commissions and does not au-

thorize the President to specify criminal offenses to be tried by military commissions.

Section 821 is similarly unavailing. That provision simply recognizes that courts martial and military commissions may possess concurrent jurisdiction under certain circumstances, Section 821 does not itself affirmatively confer jurisdiction upon military commissions.

Moreover, even if Section 821 were interpreted as conferring jurisdiction on military commissions, any such grant would by its express terms be limited to "offenses that by statute or by the law of war may be tried by military commissions." Here, however, the offense with which petitioner is charged—conspiracy—is neither specified by statute as one that may be tried by military commission nor one that is traditionally recognized under the law of war. And nothing in the UCMJ authorizes the President to add to the class of offenses triable by a military commission or to define the law of war. The President's purported authority to prosecute petitioner by military commission accordingly cannot rest on the UCMJ. See Part B, *infra*.

Congress may, under certain circumstances, delegate to the executive branch the authority to provide for trials by military commissions and to define criminal conduct by regulation. But, when Congress chooses to do so, it must do so clearly. The President's assertion of such power without clear congressional authorization undermines the Constitution's careful separation of powers and tramples on the long-understood premise that the creation of criminal sanctions is solely within the province of Congress.

ARGUMENT

CONGRESS HAS NOT AUTHORIZED THE PRESIDENT TO SUBJECT PETITIONER TO A CRIMINAL TRIAL BEFORE A MILITARY COMMISSION

The court of appeals concluded that Congress has delegated to the President essentially unlimited authority to construct an entirely new system for adjudicating criminal charges and imposing criminal punishments—a system that may be applied to United States citizens as well as to foreign nationals, to those apprehended either within the United States or outside the country, and for alleged conduct occurring anywhere in the world. It is a system that assertedly is exempt from the due process standards that apply to conventional criminal adjudication as well as from other fundamental protections safeguarded by the Constitution. Indeed, it is exempt even from the protections that apply in court martial proceedings.

The unusual characteristics of the present "war on terror" further expand the scope of this authority. Combatants could be anywhere in the world, not identified with any nation-state or even with each other. Moreover, because of the potentially indefinite duration of the war on terror, this new criminal adjudication system could continue for decades to come.

One would think that such a breathtaking assertion of authority would be supported by clear statutory language.[2] And given the potential for abuse, one would

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[2] As discussed below (at 9–10 and 19–22), a clear statement of congressional authorization is required by this Court's precedents.

expect Congress to have included checks upon any such broad grant of authority. But the government relies only on a few statutes that do not convey any authority to the President for the creation of criminal tribunals (not surprisingly, these provisions therefore contain no limitations on the authority they are claimed to convey). The court of appeals' unjustifiably expansive reading of these provisions should be overturned.

At the outset, the issues here are fundamentally different from those before the Court in *Hamdi* v. *Rumsfeld*, 542 U.S. 507 (2004). Recognizing that detention is an incident of war, a plurality of this Court there upheld, subject to certain conditions and limitations, the President's authority under the AUMF to detain enemy combatants. See *id.* at 517 ("we conclude that the AUMF is explicit congressional authorization for the detention of individuals" who engaged in an armed conflict against the United States in Afghanistan).[3]

Hamdi thus addressed only such detention; the Court had no occasion to address the imposition of punishment upon enemy combatants. In acknowledging the President's authority to detain enemy combatants, the plurality observed that "[t]he purpose of detention is to prevent captured individuals from returning to the field of battle and taking up arms once again." *Id.* at 518. The plurality recognized that "captivity in war is neither revenge, nor punishment, but solely protective custody,

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[3] *Hamdi*'s definition of "enemy combatant" necessarily is circumscribed by the facts before the Court in that case, which limit the term to persons who were part of, or supported, forces hostile to the United States or its coalition partners in Afghanistan and who engaged in an armed conflict against the United States in that country. See *Hamdi*, 542 U.S. at 516 & 522 n.1.

the only purpose of which is to prevent the prisoners of war from further participation in the war." *Ibid.* (citations and internal quotation marks omitted).

In the context of the issues presented here, the distinction between detention and punishment is an important one. Indeed, Justice Thomas, writing in dissent, observed that "the punishment-nonpunishment distinction harmonizes all of the precedent" and that "[b]ecause the Government does not detain Hamdi in order to punish him" otherwise applicable authority "do[es] not control." *Id.* at 593 (Thomas, J., dissenting).[4]

This Court has, in a variety of contexts, long recognized the distinction between detention and punishment. See, *e.g.*, *Kansas* v. *Hendricks*, 521 U.S. 346, 369 (1997) (involuntary civil "commitment under the [Kansas Sexually Violent Predator] Act is not tantamount to

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[4] The plurality remanded Hamdi's habeas petition because "due process demands some system for a citizen detainee to refute his classification" as an enemy combatant and "the 'process' Hamdi has received is not that to which he is entitled under the Due Process Clause." 542 U.S. at 538. Justice Thomas dissented on the grounds that Hamdi's "detention falls squarely within the Federal Government's war powers, and we lack the expertise and capacity to second-guess" the government's determination that he "is an enemy combatant and should be detained." *Id.* at 579.

The *Hamdi* Court did not face the question of indefinite detention. See *Hamdi*, 542 U.S. at 521 ("that is not the situation we face as of this date"). Indefinite detention poses significant constitutional issues and could be tantamount to punishment. Cf. *ibid.* ("we agree that indefinite detention for the purpose of interrogation is not authorized"); *Zadvydas* v. *Davis*, 533 U.S. 678, 690 (2001) ("A statute permitting indefinite detention of an alien would raise a serious constitutional problem.").

'punishment'"); *United States* v. *Salerno*, 481 U.S. 739, 748 (1987) ("pretrial detention contemplated by the Bail Reform Act is regulatory in nature, and does not constitute punishment"); *Schall* v. *Martin*, 467 U.S. 253, 269(1984) ("There is no indication in the statute itself that preventive detention is used or intended as a punishment."); see also, *e.g.*, *Zadvydas* v. *Davis*, 533 U.S. 678, 721 (2001) (Kennedy, J., dissenting) ("Where detention is incident to removal, the detention cannot be justified as punishment nor can the confinement or its conditions be designed in order to punish.").

Detention is traditionally prospective in nature. Its sole purpose is the prevention of future harm. Once the threat of harm has passed, detention is no longer justified and the detainee must be freed. See, *e.g.*, *Hendricks*, 521 U.S. at 363 ("Far from any punitive objective, the confinement's duration is instead linked to the stated purposes of the commitment, namely, to hold the person until his mental abnormality no longer causes him to be a threat to others."); *Foucha* v. *Louisiana*, 504 U.S. 71, 76 n.4 (1992) (person acquitted by reason of insanity "may be held until he is either not mentally ill or not dangerous").

Punishment, by contrast, is fundamentally retrospective: the imposition of sanctions for acts committed in the past. A criminal defendant facing possible punishment "has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction." *In re Winship*, 397 U.S. 358, 363 (1970). Because of those stakes, an individual may not be punished absent proof beyond a reasonable doubt. See *id.* at 364. And absent an adjudi-

cation of past wrong-doing, punishment is not permitted. See *ibid.*; see also, *e.g.*, *Jones* v. *United States*, 463 U.S. 354, 369 (1983) (noting that because person acquitted by reason of insanity "was not convicted, he may not be punished").

The plurality decision in *Hamdi* held that Congress authorized the President to detain enemy combatants to prevent future harm. The issue here is whether Congress also has authorized the President to create a new—and extraordinarily expansive—system of criminal adjudication and punishment, avoiding the two existing mechanisms for meting out punishment for past acts, the civilian courts and the court martial process.

In other contexts in which the proposed interpretation of a statute implicates fundamental values protected by the Constitution, this Court insists on a clear indication in the statutory text that Congress intended that result. See, *e.g.*, *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 243 (1985) (clear statement required to abrogate states' 11th Amendment immunity); *United States* v. *Bass*, 404 U.S. 336, 349 (1971) (clear statement required to alter federal-state balance by defining as a federal crime conduct already criminalized by states). That principle is plainly applicable here.

"Every extension of military jurisdiction is an encroachment on the jurisdiction of the civil courts, and, more important, acts as a deprivation of the right to jury trial and of other treasured constitutional protections." *Reid* v. *Covert*, 354 U.S. 1, 21 (1957). A statute may not be interpreted to override these protections absent a clear indication that Congress intended that result.

Thus, in *Duncan* v. *Kahanamoku*, 327 U.S. 304 (1946), the Court held that the Hawaii Organic Act, which authorized the territorial governor of Hawaii to place the territory under "martial law" when public safety required it, did not authorize the governor to establish military tribunals, because the statute's language and legislative history did not clearly state that military tribunals should supplant civilian courts. *Id.* at 315-16. Instead, the Act was merely intended to authorize the military to act in defense of an invasion in an effort to maintain an orderly civil government. *Id.*; see also *Coleman* v. *Tennessee*, 97 U.S. 509 (1878) (holding that a statute making certain offenses "punishable" by military tribunal did not confer on those tribunals exclusive jurisdiction over those offenses).

The government asserts that two statutes supply the necessary authorization here—the AUMF and UCMJ. Neither comes close to providing the requisite clear authority for the imposition of punishment upon petitioner by a military commission.[5]

A. The Plain Terms Of The AUMF Authorize Only The Use Of Military Force To Prevent Future Attacks, Not The Criminalization Or Adjudication Of Past Acts.

The AUMF is, by its plain terms, purely prospective. It authorizes the President "to use all necessary and appropriate force * * * in order to prevent any *future* acts of international terrorism against the United States."

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[5] Amici take no position on the extent of Congress's authority to authorize criminal trials by military commissions. They address only the absence of congressional authorization for the system created by Military Commission Order No. 2.

Pub. L. 107-40, 115 Stat. 224 (2001) (emphasis added).[6] The AUMF does not, and does not purport to, authorize the President to adjudicate past acts by military commission or any other means.

Like other statutes, the AUMF should be given its plain meaning. See, *e.g.*, *Rake* v. *Wade*, 508 U.S. 464, 471 (1993) ("Where the statutory language is clear, our "'sole function . . . is to enforce it according to its terms.'") (quoting *United States* v. *Ron Pair Enter's, Inc.*, 489 U.S. 235, 241 (1989)); *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 254 (1992) ("When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'") (quoting *Rubin* v. *United States*, 449 U.S. 424, 430 (1981)).

As its terms and title indicate, the AUMF is an authorization to use *force*, and not just any kind of force, but *military* force. Force, and in particular military force, is very different from adjudication. While an adjudication is the determination of the rights and duties of the parties to a court case, see WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 27 (1986), force, especially military force, is "power, violence, [and] compulsion," *id.* at 887.[7] See also COMPACT OXFORD ENGLISH DIC-

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[6] See also 147 Cong. Rec. H5640 (statement of Rep. Hoeffel) ("It is important, I believe, to note that this grant of authority and this purpose of force is to prevent any future acts of international terrorism against the United States.").

[7] It is well established that "[i]n the absence of an indication to the contrary, words in a statute are assumed to bear their 'ordinary, contemporary, common meaning.'" *Walters* v. *Metro. Educ. Enters., Inc.*, 519 U.S. 202, 207 (1997) (quoting *Pioneer Inv. Servs. Co.* v. *Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 388 (1993)).

TIONARY 618 (2d ed. 1987) (defining force as "physical strength," "might," and "violence"). Accordingly, an authorization to use force is neither a mandate to adjudicate nor a delegation of authority to establish a system of tribunals to administer punishment for past acts.

Indeed, the legislative history of the AUMF indicates that Congress did not mean to endow the executive branch with legislative and judicial powers. As one of its authors noted during the debate preceding its adoption, the AUMF "does not recognize any greater presidential authority than is recognized by the War Powers Resolution nor does it grant any new authority to the President." 147 Cong. Rec. S9416 (Sept. 14, 2001) (statement of Sen. Levin). See also *id.* at H5677 (statement of Rep. McGovern) (the AUMF "reiterates the existing constitutional powers of the President to take action to defend the United States, but provides no new or additional grant of powers to the President"). On the contrary, in adopting the AUMF, Congress made a point of reaffirming "the brilliant separation of powers that guard our democracy." *Id.* at S9418 (statement of Sen. Feingold). See also *id.* at H5640 (statement of Rep. Lantos) ("In granting the President this power, Congress is not abdicating its prerogatives.").

Congress recognized that "[w]hen writing the Constitution, our Founding Fathers created a balance of powers between the three branches of government to prevent one branch from inappropriately dominating another" and that maintaining the tripartite separation of powers was critical "even in time of extreme crisis." *Id.* at H5678 (statement of Rep. Stark). Thus, in enacting the AUMF, Congress did not intend that "the executive

branch become the exclusive branch." *Id.* at H5654 (statement of Rep. Doggett).

In urging passage of the AUMF, Rep. Conyers, the ranking member of the House Judiciary Committee, did not advocate granting new executive powers to impose punishment, but rather emphasized that "[t]hese acts of hijacking, murder, and terrorism are crimes for which there are laws and punishments under Federal law" and that "we should arrest and try" the perpetrators of the September 11 attacks "as our justice system demands." *Id.* at H5680. Notably, the very same day that it adopted the AUMF, Congress also enacted an emergency supplemental appropriations bill, one purpose of which was to finance "the investigations and eventual prosecution of those who committed" the September 11 attacks. *Id.* at S9420 (statement of Sen. Kennedy). Insofar as Congress simultaneously appropriated substantial funds to "enable America's law enforcement agencies to continue their urgent efforts to identify all persons who were involved in these atrocities," *ibid.*, it is clear that Congress did *not* intend for the AUMF to create an entirely new criminal justice system separate and apart from that which already existed.

In sum, the AUMF's grant of authority is important, but limited. It empowers the President to use "force * * * in order to prevent any *future* acts of international terrorism against the United States." Pub. L. No. 107-40, 115 Stat. 224 (2001) (emphasis added). Because punishment for alleged *past* acts is indisputably the central purpose of trying petitioner before a military commission, it is impossible to find in the AUMF the necessary clear authority for conducting such a criminal trial-by-commission.

B. The UCMJ Does Not Provide The Necessary Clear Congressional Authority.

Two sections of the UCMJ have been invoked to justify the President's order. Section 836 provides in pertinent part that "[p]retrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts." 10 U.S.C. § 836(a).

This section plainly gives the President the authority to establish only *procedures*—not substantive rules or additional jurisdiction—for military tribunals.[8] This point apparently did not elude the Executive Branch, which omitted Section 836 from its list of statutory provisions purportedly conferring authority for the adoption of Military Commission Instruction No. 2, the regulation promulgating "crimes that may be tried by military commissions." See 32 C.F.R. § 11.2.

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[8] In this respect, Section 836 is analogous to the Rules Enabling Act, 28 U.S.C. § 2072, which gives this Court "the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals." It is beyond debate that this grant confers on the Court no authority to make rules extending the *jurisdiction* of the courts whose procedures it may prescribe. See, *e.g.*, *Henderson* v. *United States*, 517 U.S. 654, 664 (1996).

The other UCMJ provision—Section 821—similarly falls far short of clearly conveying the requisite authority, as we next discuss.

1. The plain language of Section 821 does not contain any clear grant of authority to the President.

Section 821 provides:

> The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals.

10 U.S.C. § 821.

There is no basis for finding an affirmative grant of jurisdiction in a provision that is simply a savings clause—ensuring that a grant of jurisdiction to one type of tribunal is not interpreted to preclude the jurisdiction of another type of tribunal. In the words of its heading, Section 821 merely explains that the "[j]urisdiction of courts-martial [is] not exclusive." Nothing in Section 821 confers jurisdiction on military commissions; it simply prevents other statutes from being construed to narrow the separately-conferred jurisdiction of these tribunals.

2. *Quirin* does not require a different construction of Section 821.

Notwithstanding the plain language of Section 821, the court of appeals held that the statute broadly author-

izes criminal trials by military commissions based on this Court's decision in *Ex Parte Quirin*, 317 U.S. 1, 37 (1942). Pet. App. 6a–7a. *Quirin* does not support the court of appeals' conclusion.

The case involved admitted enemy combatants who "without uniform" entered into the United States "for the purpose of destroying property used or useful in prosecuting the war." 317 U.S. at 37. The Court's decision upholding the jurisdiction of the military commissions rested on the particular nature of the alleged conduct.

Thus, the Court emphasized that it "[held] only that those particular acts constitute an offense against the law of war, which the Constitution authorizes to be tried by military commission." 317 U.S. at 46. See also *id.* at 35 ("[b]y a long course of practical administrative construction by its military authorities, our Government has * * * recognized that those who during time of war pass surreptitiously from enemy territory into our own, discarding the uniforms upon entry, for the commission of hostile acts involving destruction of life or property, have the status of unlawful combatants punishable as such by military commissions"); *id.* at 31 n.10 (describing history).

Significantly, as the Court noted (317 U.S. at 23), the defendants in *Quirin* also had been charged with violating Article 82 of the Articles of War (criminalizing spying), which expressly authorized trials of that offense by military commissions. The Court analogized the defendant's conduct to spying. See *id.* at 41-42.

To be sure, the *Quirin* Court expressly did not rely on Article 82, and the opinion contains broad statements

regarding the jurisdiction conferred on military commissions by Article 15, which is the predecessor to Section 821. See, *e.g.*, 317 U.S. at 35. But the Court nowhere even attempted to explain how that broad construction could be squared with the plain language of Article 15, and it certainly did not identify any clear statement of congressional authorization. Accordingly, *Quirin* is most logically interpreted as confined to its facts: a determination, based upon long historical practice and the existence of the express authority for trials of spies by military commission, that unlawful combatants entering the United States as saboteurs may be tried by military commission.

3. Even if Section 821 authorizes military commissions, it does not authorize adjudication of the charges against petitioner.

If this Court concludes, contrary to our submission, that Section 821 does confer jurisdiction upon military commissions, that jurisdiction plainly would be limited to "offenses that by statute or by the law of war may be tried by military commissions." The government here does not rely on any statutory authorization,[9] so the jurisdiction of the military commissions turns upon the scope of the statutory term "the law of war."

Unlike the defendants in *Quirin*, petitioner has not been charged with violating the law of war. He has been charged with violating several provisions of Military

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[9] Congress has statutorily established only two offenses triable by military commission: aiding the enemy (10 U.S.C. § 904), and spying (*id.* § 906). Petitioner is charged with neither and, moreover, neither statute delegates the authority to create crimes.

Commission Instruction No. 2. But nothing in Section 821 gives the President the power to define the offenses that may be tried by a military commission. Rather, the Constitution and settled precedent of this Court make clear that an explicit delegation of authority from Congress is required to enable the Executive Branch to define criminal offenses. There is no such delegation here. The governing legal standard is therefore the one specified by Congress in Section 821.

Moreover, Congress has not even given the President the power to interpret by regulation the term "law of war." Military Commission Instruction No. 2 thus represents at most the President's view of what constitutes violations of the law of war—a view that is not binding on any tribunal and certainly not on this Court.

To determine whether petitioner may be tried criminally by a military commission, this Court must undertake the analysis applied in *Quirin*: ascertaining whether the conduct alleged violates a "precept of the law of war [that] has been so recognized in practice both here and abroad, and has so generally been accepted as valid by authorities on international law that * * * it must be regarded as a rule or principle of the law of war recognized by this Government by its enactment of [Section 821]." 317 U.S. at 35-36. The charges against petitioner do not come close to satisfying this standard. Accordingly, Section 821 does not authorize the trial of petitioner before a military commission.

a. Clear congressional authorization is necessary to empower the President to issue regulations defining criminal offenses.

The Constitution grants Congress the power "[t]o define and punish * * * Offences against the Law of Nations." U.S. Const. art. I, § 8, cl.10. This Court made clear in *Quirin* that "laws defining and punishing offences against the law of nations" includes laws that "pertain to the conduct of war." 317 U.S. at 26.

"[N]o absolute rule" prohibits Congress from delegating some of its authority "to define criminal punishments." *Loving* v. *United States*, 517 U.S. 748, 768 (1996). But such delegations must be explicit. The President cannot issue regulations defining conduct as criminal unless "***Congress*** makes the violation of regulations a criminal offense, and fixes the punishment." *Ibid.* (emphasis added). Thus, "[i]t is necessary that a sufficient statutory authority should exist for declaring any act or omission a criminal offense." *United States* v. *Eaton*, 144 U.S. 677, 688 (1892); see also *United States* v. *Hudson*, 11 U.S. 32, 34 (1812) ("The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offence.").[10]

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[10] This requirement that Congress provide explicitly for any delegation of its authority to define criminal acts is fundamental to maintaining the constitutional separation of powers. See *Touby* v. *United States*, 500 U.S. 160, 165 (1991) ("The nondelegation doctrine is rooted in the principle of separation of powers that underlies our tripartite system of Government." (quoting *Mistretta* v. *United States*, 488 U.S. 361, 371 (1989))). This Court's reasoning in *Reid* v. *Covert*, 354 U.S. 1 (1957), illustrates this point.

The statute at issue in *Eaton* authorized the Commissioner of Internal Revenue to "make all needful regulations for carrying into effect of this act." 144 U.S. at 685. Eaton was charged with failing to keep books as required by the Commissioner's regulations; this Court held that violation of the Commissioner's regulations was not a valid basis for punishing Eaton. "It is necessary that a sufficient statutory authority should exist for declaring any act or omission a criminal offense," the Court explained, "and we do not think that the statutory authority in the present case is sufficient." 144 U.S. at 688. Just because regulations issued by the Executive had the "force of law" did not mean that "neglect" of those regulations is a crime "where a statute does not

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The Court in *Reid* held that civilian dependents of military personnel could not constitutionally be tried by court-martial for murder. In the course of reaching that conclusion, the Court observed that "Congress has given the President broad discretion to provide the rules governing military trials." *Id.* at 38 (citing Art. 36 of the Uniform Code of Military Justice). "If the President can provide rules of substantive law as well as procedure," the Court reasoned, "then he and his military subordinates exercise legislative, executive and judicial powers with respect to those subject to military trials. Such blending of functions in one branch of the Government is the objectionable thing which the draftsmen of the Constitution endeavored to prevent by providing for the separation of governmental powers." *Id.* at 38-39; see also *id.* at 11-12 (characterizing the Court's approval in *Ross* v. *McIntyre*, 140 U.S. 453 (1891), of statutes authorizing consuls to "make the criminal laws, initiate charges, arrest alleged offenders, try them, and after conviction take away their liberty or their life," as "a relic from a different era," and explaining that "[s]uch a blending of executive, legislative, and judicial powers in one person or even in one branch of the Government is ordinarily regarded as the very acme of absolutism").

distinctly make the neglect in question a criminal offense." *Ibid.* (emphasis added).

By comparison, *United States* v. *Grimaud*, 220 U.S. 506 (1911), upheld a conviction for violating a regulation promulgated by the Secretary of Agriculture that prohibited the knowing and willful grazing, without a permit, of sheep on certain land within the Sierra Forest Reserve. The relevant statute gave the Secretary authority to "make such rules and regulations and establish such service as will insure the objects of such reservations; namely, to regulate their occupancy and use, and to preserve the forests thereon from destruction." *Id.* at 515. Crucially, the act also stated that "*any violation of the provisions of this act or such rules and regulations shall be punished.*" *Id.* at 515 (emphasis in original).

The Court explained that "a violation of the regulations" at issue in *Eaton* "might have been punished as an offense if Congress had so enacted," but the statute had "made no such provision." *Grimaud*, 220 U.S. at 519. In *Grimaud* itself, the statute that authorized the Secretary to issue regulations also provided that persons violating those regulations would be "punished." *Ibid.* Thus, "[a] violation of reasonable rules regulating the use and occupancy of the property is made a crime, not by the Secretary, but by Congress. The statute, not the Secretary, fixes the penalty." *Id.* at 522.

This Court's recent opinion in *Loving* v. *United States* affirms the continuing vitality of the principle expounded in *Eaton* and *Grimaud*. Citing both *Grimaud* and *Touby* v. *United States*, the Court in *Loving* observed that it had "upheld delegations whereby the Executive or an independent agency defines by regulation what conduct will be criminal, ***so long as*** Congress

makes the violation of regulations a criminal offense and fixes the punishment, and the regulations 'confin[e] themselves within the field covered by the statute.'" *Loving*, 517 U.S. at 768 (quoting *Grimaud*, 220 U.S. at 518) (emphasis added) (brackets in original). Conversely, if Congress has not explicitly stated that it is a punishable crime to violate regulations promulgated by the Executive, it has not delegated its authority to define and punish criminal offenses.

This Court's decisions thus establish two prerequisites for the delegation of Congress's power to define criminal offenses: first, an express delegation of rulemaking authority; second, an explicit statement by Congress that violations of the regulations promulgated pursuant to that authority may result in criminal sanctions.

b. Congress has not clearly authorized the President to issue regulations defining the offenses that may be tried by a military commission.

Military Commission Order No. 2 (codified at 32 C.F.R. Part 11) lists 33 separate criminal offenses that may be adjudicated by military commissions. The order cites Section 821 of the UCMJ as the source of the President's authority to establish these offenses. That statute is plainly inadequate under the standard established by this Court in *Loving* and its predecessors.

This Court has never found a congressional delegation of criminal lawmaking authority in a statute as limited and opaque as Section 821. That section, which merely confirms the existence of concurrent jurisdiction over otherwise-defined crimes, contains no authority to

issue "rules and regulations" governing primary conduct, much less anything that could be construed as authorization of criminal punishment for regulatory violations. See page 15, *supra*. Because such explicit statements are necessary to a valid delegation of Congress' authority to define criminal offenses, Section 821 cannot qualify as such a delegation.

The absence of delegation language in Section 821 is even more stark when that section is compared to Section 836 of Title 10. Section 836 provides explicitly that "[p]retrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in * * * military commissions * * * may be prescribed by the President ***by regulation***." (emphasis added). That language unquestionably delegates certain authority to the President, illustrating that when Congress intends to give the Executive rulemaking authority, it is perfectly capable of doing so "distinctly," *Eaton*, 144 U.S. at 688.

Notably, the language in Section 836 delegates to the President authority to prescribe procedural regulations, not substantive ones. So while the scope of the President's ability to regulate the "[p]retrial, trial, and post-trial procedures" of military commissions under this section may be debated, the section cannot be construed to permit the President to define the substantive elements of the crimes charged in such commissions. The utter lack of any language in Section 836 "declaring any act or omission a criminal offense," *Eaton*, 144 U.S. at 688, precludes any argument that Congress in that provision granted the President discretion to define such offenses.

The government may argue in the alternative that the President has authority to issue regulations defining the

term "law of war" in Section 821. See 32 C.F.R. § 11.3(a) (asserting that the list of offenses in Military Commission Order No. 2 "derive from the law of armed conflict, a body of law that is sometimes referred to as the law of war").

As we have discussed (see pages 19–22, *supra*), the Constitution bestows on Congress the exclusive power to "define and punish * * * Offences against the Law of Nations" (U.S. Const. art. I, § 1, cl. 10), a category that includes the "law of war." Nothing in Section 821 grants the President rulemaking authority to define this term.[11] As the Court explained in *Quirin*, "Congress had the choice of crystallizing in permanent form and in minute detail every offense against the law of war, or of adopting the system of common law applied by military tribunals so far as it should be recognized and deemed applicable by the courts. It chose the latter course." 317 U.S. at 30.

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[11] Congress has shown itself to be fully capable of giving the requisite specificity to the law of war. For instance, Congress enacted the War Crimes Act of 1996, 18 U.S.C. § 2441, which fulfills the United States' obligation under the Geneva Conventions to enact "any legislation necessary to provide effective penal sanctions" for persons committing "grave breaches" of the Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949, art. 129, 6 U.S.T. 3316, 74 U.N.T.S. 135 (the "Third Geneva Convention"). The War Crimes Act and the Expanded War Crimes Act of 1997 make it a federal criminal offense to commit a grave breach of the Geneva Conventions, or to commit a violation of Common Article 3. See 18 U.S.C. § 2441. However, the Act contains jurisdictional requirements that curtail its application to acts committed by or against members of the U.S. Armed Forces or other U.S. nationals.

The President is, of course, entitled to urge his construction of the statutory term in the course of this common law process. But his regulations are not entitled to any more deference than would be accorded to the government's arguments before this tribunal; they are not entitled to the deference accorded to rules issued by an expert agency authorized by Congress.

c. The vast majority of the offenses listed in Military Commission Order No. 2 do not qualify as "offenses that * * * by the law of war may be tried by military commission."

Military Commission Order No. 2 lists a smorgasbord of offenses. The enumerated crimes are divided into three distinct sections: (1) "Substantive Offenses – War Crimes" (Section 6(A))[12]; (2) "Substantive Offenses – Other Offenses Triable by Military Commission" (Section 6(B))[13]; and (3) "Other Forms of Liability and Related Offenses" (Section 6(C)).[14]

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[12] Crimes against the law of war listed in Part 11 are (1) Willful Killing of Protected Persons; (2) Attacking Civilians; (3) Attacking Civilian Objects; (4) Attacking Protecting Property; (5) Pillaging; (6) Denying Quarter; (7) Taking Hostages; (8) Employing Poison or Analogous Weapons; (9) Using Protected Persons as Shields; (10) Using Protected Property as Shields; (11) Torture; (12) Causing Serious Injury; (13) Mutilation or Maiming; (14) Use of Treachery or Perfidy; (15) Improper Use of a Flag of Truce; (16) Improper Use of Protective Emblems; (17) Degrading Treatment of a Dead Body; and (18) Rape. See 32 C.F.R. § 11.6(a)

[13] Crimes "triable by military commission" include (1) Hijacking or Hazarding a Vessel or Aircraft; (2) Terrorism; (3) Murder by an Unprivileged Belligerent; (4) Destruction of Property by an Unprivileged Belligerent; (5) Aiding the Enemy; (6) Spying; (7) Per-

Under *Quirin*, the standard for determining whether a particular offense is punishable by a military commission under the law of war is whether it "has been so recognized in practice both [in the United States] and abroad, and has so generally been accepted as valid by authorities on international law that * * * it must be regarded as a rule or principle of the law of war" that was recognized by Congress through its enactment of Section 821. 317 U.S. at 35-36 (footnote omitted). In determining that the offense of "surreptitiously [passing] from enemy territory into our own, discarding their uniforms upon entry, for the commission of hostile acts involving destruction of life or property" satisfied this standard, the Court pointed to a long documented history of punishment by military commissions in this country (*id.* at 31 n.10) as well as numerous international law authorities documenting the same practice in other nations (*id.* at 35 n.12).

This is an extraordinarily demanding standard, and for good reason. Military commissions circumvent the long-established means of imposing criminal punishment: civilian courts and military courts martial. These commissions accordingly should be limited to situations in which there is clear, settled precedent for the imposition of punishment in these tribunals. The high standard also serves to protect due process interests, such as fair

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jury or False Testimony; (8) Obstruction of Justice Related to Military Commissions. See 32 C.F.R. § 11.6(b).

[14] Other forms of liability and related offenses include: (1) Aiding and Abetting; (2) Solicitation; (3) Command/Superior Responsibility – Perpetrating; (4) Command/Superior Responsibility – Misprision; (5) Accessory After the Fact; (6) Conspiracy; and (7) Attempt. See 32 C.F.R. § 11.6(c).

notice, that are not satisfied by a vague standard such as "the law of war."

The government has made no such showing—nor could it—with respect to the 33 offenses in the Order, or even for the single offense of conspiracy with which Hamdan has been charged. The offense of conspiracy—like many of the other specified offenses, including for example hijacking and terrorism—has no roots in the body of treaties and custom that comprise the law of war. See generally Human Rights First, Trial Under Military Order, A Guide to the Final Rules for Military Commissions (2004) ["Trial Under Military Order"], available at http://www.humanrightsfirst.org/us_law/PDF/detainees/trials_under_order0604.pdf; Brief of Specialists in Conspiracy and International Law in Support of Petitioner (discussing this issue comprehensively).[15]

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[15] 32 C.F.R. 11 is also broader than the law of war insofar as its definition of "armed conflict" "does not require a declaration of war, ongoing mutual hostilities, or a confrontation involving a regular national armed force," but can be met by a "single hostile act or attempted act" provided that the magnitude of this act rises to the level of an armed attack or an act of war. 32 C.F.R. § 11.5(c). This definition exceeds the customary law of war, which considers international armed conflict to be conflict between states and, with regard to non-state actors, covers only extended armed conflict between governmental authorities and organized groups and does not apply to isolated or sporadic acts of violence. See Human Rights First, Trial Under Military Order, A Guide to the Final Rules for Military Commissions (2004), available at http://www.humanrightsfirst.org/us_law/PDF/detainees/trials_under_order0604.pdf (citing Third Geneva Convention, art. 2 and the Rome Statute of the International Criminal Court, art. 8(2)(f), July 1, 2002, 2187 U.N.T.S. 90).

None of the Hague or Geneva Conventions, which the *Hamdi* plurality viewed as embodying "longstanding law-of-war principles," see *Hamdi*, 542 U.S. at 521, makes mention of conspiracy. Significantly, even the 1949 Geneva Conventions, which provided for enforcement of so-called "grave breaches" of their provisions by individual nations through domestic criminal proceedings, do not include conspiracy among the punishable offenses. See Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949 (GPW), art. 87, 6 U.S.T. 3316, 74 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949, art. 33, 6 U.S.T. 3516. Grave breaches under the GPW, for example, include willful killing; torture or inhuman treatment, including biological experimentation; willfully causing great suffering or serious injury to body or health; compelling a prisoner of war to serve in the armed forces of a hostile power; and willfully depriving a prisoner of war of the rights of fair and regular trial. See GPW, art. 130. While the Conventions do not criminalize *conspiracy* to commit these offenses, they do extend liability beyond the actual perpetrators of these offenses to those who "order" their commission. *Id.* art. 129. (The government does not allege that petitioner falls within the latter category.)

Conspiracy liability is also notably absent from the U.S. War Crimes Act of 1996, 18 U.S.C. § 2441 (2000), which carries out the Geneva Convention mandate of domestic criminalization of grave breaches of the Conventions. The failure to criminalize conspiracy to commit these offenses stands in stark contrast to the conspiracy liability provisions enacted for other crimes

in Title 18, including torture (§ 2340A(c)), terrorism (§ 2332(b)), and sedition (§ 2384).

The statutes and treaties creating the major tribunals for adjudication of international criminal law—namely, the International Criminal Tribunal for the Former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), and the International Criminal Court—further illustrate that conspiracy is not an offense recognized by the law of war. See Statute of the International Criminal Tribunal for the Former Yugoslavia, May 25, 1993, 32 I.L.M. 1192; Statute of the International Criminal Tribunal for Rwanda, Nov. 8, 1994, 33 I.L.M. 1598; Rome Statute of the International Criminal Court, July 17, 1998, 37 I.L.M. 999. With respect to the ICTY and ICTR, when the United Nations Security Council established these tribunals and vested them with jurisdiction to adjudicate violations of the law of war, it declined to include conspiracy as an offense, with only a limited exception for conspiracy to commit genocide. 1 Virginia Morris & Michael P. Scharf, *An Insider's Guide to the International Criminal Tribunal for the former Yugoslavia* 96 (1995). As to the ICC, its statute does not define conspiracy as an offense, although it does criminalize other inchoate offenses, including attempt and solicitation. See ICC Statute, art. 25.

The conspicuous absence of a conspiracy offense *in* any of these venerable sources demonstrates that conspiracy plainly does not satisfy the demanding *Quirin* standard, and thus is not an offense recognized by the law of war. Because conspiracy is the only offense with which Petitioner has been charged, he may not be subjected to a criminal trial before a military commission.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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